

Hon. Peter G. Sheridan
United States District Judge
Clarkson S. Fisher Building & U.S. Courthouse
402 East State Street
Trenton, N.J. 08608

October 27, 2018
Civil Action No. 17-6482 (PGS)

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AT 8:30 _____ M
WILLIAM T. WALSH
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LETTER BRIEF on PEREIRA v. SESSIONS

Dear Judge Sheridan:

In reply to the DOL's October 18 letter brief, it is as though we read two different Pereira opinions from the U.S. Supreme Court. The key to reading Pereira is not the majority opinion, but the concurring opinion by Justice Kennedy and the dissent by Justice Alito.

From page 3 of Justice Kennedy's three page concurring opinion in Pereira:

"...it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision. The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary."

This quote is the end of Justice Kennedy's concurring opinion. It might be his last words as a Justice as he retired at the end of the term and he is saying let's get rid of Chevron.

From pages 2-3 of Justice Kennedy's concurrence in Pereira:

"The type of reflexive deference exhibited in some of these cases is troubling. And when deference is applied to other questions of statutory interpretation, such as an agency's interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still. See *Arlington v. FCC*, 569 U. S. 290, 327 (2013) (ROBERTS, C. J., dissenting) ("We do not leave it to the agency to decide when it is in charge"). Given the concerns raised by some Members of this Court, see, e.g., *id.*, at 312–328; *Michigan v. EPA*, 576 U. S. ___, ___ (2015) (THOMAS, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F. 3d 1142, 1149–1158 (CA10 2016) (Gorsuch, J., concurring)..."

While on the Tenth Circuit Court of Appeals in 2016, Justice Gorsuch of the US Supreme Court decimated Chevron in Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (2016). My August 2018 brief to your honor had 9 quotes from Justice Gorsuch that decimated Chevron.

“This concurrence is remarkable not only because it was wholly unnecessary to the disposition of the case, but also because it cites (and thus embraces) many of the most aggressive criticisms of *Chevron* published by the Court’s more conservative members. There can be little doubt in light of this opinion that Justice Kennedy is open to revisiting and drastically revising fundamental principles of administrative law. Since we know he already has four other votes to achieve that goal, *Chevron*’s fate appears to be sealed.” From <https://takecareblog.com/blog/the-imminent-demise-of-chevron-deference> June 21, 2018”

From page one (slip opinion) of Justice Alito’s dissent in Pereira:

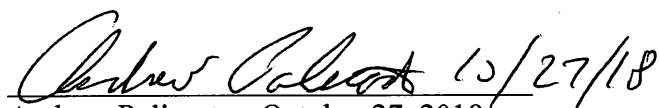
“I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*.”

The eight other Justices ignored Chevron because they know it is not good law!

From page 16 (slip opinion) of Justice Alito’s dissent in Pereira:

“In recent years, several Members of this Court have questioned *Chevron*’s foundations. See, e.g., *ante*, at 2–3 (KENNEDY, J., concurring); *Michigan v. EPA*, 576 U. S. ___, ___–___ (2015) (THOMAS, J., concurring) (slip op., at 1–5); *Gutierrez-Brizuela v. Lynch*, 834 F. 3d 1142, 1149 (CA10 2016) (Gorsuch, J., concurring). But unless the Court has overruled *Chevron* in a secret decision that has somehow escaped my attention, it remains good law. I respectfully dissent.”

The 8-1 decision in Pereira shows that the Court believes Chevron is not good law. Justice Alito just did not get the memo!

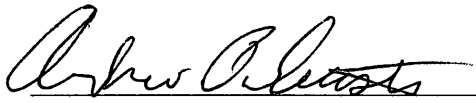

Andrew Policastro, October 27, 2018

PROOF OF SERVICE

I certify that on October 27, 2018 I mailed two copies of:

Plaintiff's Response to Defendant Secretary Acosta's October 18, 2018 letter brief
via first class USPS mail to the following party at the address listed below:

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 Date 10/27/18

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